Supreme Court, U.S.
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No. 90-1947

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOHN K. YEE and IRENE YEE, et al.,
Petitioners,

vs.

CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does Escondido, California's mobilehome space rent control ordinance (the "Escondido Ordinance") take possessory interests in Petitioners' realty and transfer those interests to residents of Petitioners' mobilehome parks, without compensation, in violation of the Fifth and Fourteenth Amendments?

2. Does the Escondido Ordinance substantially advance a legitimate state purpose, or does it simply enrich those residents who were in place when the voters enacted rent control, by permitting them to sell the property rights transferred by operation of the Ordinance?

3. Does the Escondido Ordinance deprive Petitioners of interests in their property without due process of law, where its only effect is to transfer valuable property rights to residents, who can sell those rights, and increase housing costs for future residents?

LIST OF PARTIES

The parties to this proceeding are Petitioners, John K. Yee and Irene S. Yee, H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler d/b/a Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estates, Vista Verde, Ltd., Imperial Escondido Mobile Estates and Mildred D. Tacey, and Respondent, City of Escondido.

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BRIEF FOR PETITIONERS

Petitioners, John K. Yee and Irene Yee, *et al.*, respectfully request this Court to reverse the judgment of the California Court of Appeal and remand these consolidated cases for trial.

OPINIONS BELOW

On March 30, 1989, the San Diego County Superior Court sustained the City of Escondido's demurrer to John and Irene Yee's complaint for failure to state a cause of action and dismissed the complaint. (Appendix C to Petition). The other Petitioners' claims were also dismissed on demurrer by the Superior Court. The

California Court of Appeal, Fourth Appellate District, Division One, in consolidated case No. D010307,[1] entered its opinion affirming dismissal of Petitioners' complaints on October 31, 1990. The opinion became final on February 4, 1991, and is reported at 224 Cal.App.3d 1349, 274 Cal.Rptr. 551. (Appendix A to Petition). The California Supreme Court denied Petitioners' timely consolidated petition for review on January 24, 1991. (Appendix B to Petition).

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. section 1257. Petitioners contend that the Escondido Ordinance operates to appropriate interests in their property in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and deprives them of interests in their property without due process of law in violation of the same amendments. The decision of the California Court of Appeal affirming dismissals by the San Diego Superior Court was filed on October 31, 1991. The California Supreme Court denied review on January 24, 1991.

On April 30, 1991, pursuant to Petitioners' application, Justice O'Connor entered an order extending the time for filing of the petition for a writ of certiorari to and including June 23, 1991. Petitioners filed the Petition with this Court by deposit in the United States mails on June 19, 1991; this Court received the Petition on June

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[1]The following case numbers were consolidated at the request of the Court of Appeal: D010307, D010769, D010805, D010942, D010972, D011011, D011046, D011115, D011027, D011028, D011029, and D011030. The clerk's transcripts for the first eight cases are relevant to this appeal.

21, 1991. This Court granted the writ of certiorari on October 15, 1991.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Mobilehome Residency Law, codified at Sections 798 *et seq.* of the California Civil Code, regulates mobilehome space tenancies and the operation of mobilehome parks. Park owners cannot (1) terminate tenancies without specified cause; (2) require removal of mobilehome coaches when tenancies end; or (3) disapprove incoming tenants who purchase mobilehome coaches, so long as the purchasers are creditworthy and unlikely to violate park rules. Cal. Civ. Code §§ 798.55, 798.73, 798.74 (West 1991). (Pertinent portions of the California Mobilehome Residency Law are reproduced verbatim at App. D to Petition.).

The Escondido Municipal Code Article V, Sections 1-9 (the "Escondido Ordinance"), codifies Proposition K, a voter initiative passed on June 7, 1988, that imposed rent control on Escondido's 29 mobilehome parks. Section 3 of the Escondido Ordinance provides:

> Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986. . . . No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase

> from [the City Council, which serves as the Mobilehome Park Rental Review Board].

The Escondido Ordinance further provides that "[a]ny person who demands, accepts or retains any payment of rent in violation of the provisions of this Ordinance shall be liable in a civil action to the person from whom such payment is demanded, . . ." and "any person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor." Escondido Ordinance § 8(a), (b). Section 6 duplicates eviction and termination provisions of the Residency Law for tenancies not subject to the statute.[2] The Escondido Ordinance contains no provision for rent adjustments when tenancies end upon transfer of a mobilehome coach. (The full text of the Escondido Ordinance appears at J.A. 21-30).

STATEMENT OF THE CASE

Petitioners in these consolidated cases own nine of Escondido's twenty-nine mobilehome parks. Residents in the mobilehome parks rent those spaces, on which they place their mobilehome coaches. Residents enjoy the use of private streets, common areas, and such amenities as swimming pools and clubhouses. Mobilehome coaches are prefabricated structures that are purchased from dealers, towed into place, and then installed on prepared spaces and connected to the park's utility systems and prepared for occupancy. They are personal property.[3] Once installed, mobilehome coaches may be removed, but removals are rare.

[2]Under California law, certain long term leases of mobilehome spaces are exempt from local rent controls. Cal. Civ. Code § 798.17 (West 1991).

[3]*Hall v. Santa Barbara*, 833 F.2d 1270, 1273 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988).

Petitioners' properties are subject to California's Mobilehome Residency Law. Under the Residency Law, mobilehome park owners may not evict tenants without just cause, require removal of the mobilehome coach when tenancies end, or disapprove incoming tenants who purchase mobilehome coaches in place, unless the incoming tenant has poor credit, or is unlikely to obey park rules. On June 7, 1988, by a vote of 11,148 to 9,499, Escondido voters approved Proposition K, an initiative ordinance imposing strict rent and eviction controls on the City's 3,656 mobilehome spaces. Thirty days after the election, rents were reduced to the levels in effect two and a half years earlier. Rent increases became misdemeanors, unless approved by the City Council, sitting as the Mobilehome Park Rental Review Board. Mobilehome park owners may petition the City Council for rent increases on various grounds, but there is no provision for any rent adjustment when mobilehome coaches are sold in place.

On December 1, 1988, John and Irene Yee filed suit under 42 U.S.C. section 1983 against the City of Escondido (the "City") in San Diego County Superior Court, alleging that the Escondido Ordinance, as applied to their property, operates to take interests in their property in violation of the Fifth and Fourteenth Amendments and Article I, Section 19 of the California Constitution. The factual allegations in the complaint (and those in the related cases with which the Yees' case was later consolidated) are indistinguishable from the claims sustained in *Hall v. Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), and *Pinewood Estates v. Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990), and later proved in *Azul Pacifico Inc. v. Los*

Angeles, ___ F.2d ___, Nos. 90-55853 & 90-56066, slip op. 15213 (9th Cir. Nov. 1, 1991).

The Yees alleged that the Escondido Ordinance, operating in conjunction with the California Mobilehome Residency Law, transfers to their tenants a valuable possessory interest in the realty, akin to a leasehold, without compensation. Specifically, the Escondido Ordinance transfers the rights to: (1) occupy a mobilehome space in perpetuity, (2) pay below market rent in perpetuity, (3) select the next tenant to occupy the space, (4) fix the successor tenant's effective rent by charging a premium on the sale of the mobilehome coach, and (5) sell, bequeath or pass by intestacy all of these rights which previously inhered in the mobilehome park owner's property. The Yees sought damages in inverse condemnation, a declaration of the constitutional invalidity of the Escondido Ordinance, and a permanent injunction against further enforcement of those provisions that do not allow a mobilehome park owner to increase rents upon transfer or sale of a mobilehome coach.

The Superior Court ruled that Petitioners' complaints stated no claim and sustained the City's demurrers without leave to amend. Petitioners appealed, but the California Court of Appeal declined to follow the federal precedent set by *Hall* and *Pinewood* and affirmed the trial court's dismissal of the consolidated actions. The California Supreme Court denied the petition for review of the Court of Appeal's decision. By order dated October 15, 1991, this Court granted the Petition for Certiorari, as to the taking and due process questions presented in the Petition. Petitioners ask this Court to reverse the decision below, with instructions to remand to the trial court for trial.

SUMMARY OF ARGUMENT

Petitioners in this case do not challenge rent controls generally. They do challenge those provisions of the Escondido Ordinance that prevent rent adjustments when mobilehome coaches are sold in place. The inevitable result (as Petitioners allege, and as proved at trial in a similar case) is to allow the incumbent tenant to charge a large premium for his used mobilehome when he decides to move. That premium — equivalent to future rent savings — represents the value of a possessory interest in the realty, created by operation of the Ordinance. The only real effect of the provisions that Petitioners challenge is to transfer valuable, marketable property rights from the property owner to tenants in residence at the time Escondido voters enacted the Ordinance.

That constitutes a taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Ordinance allows incumbent tenants to choose their successors and pocket a large resale premium, which represents the value of the property rights taken from the owner by operation of law. The Ordinance thus authorizes a permanent physical occupation of Petitioners' property without compensation.

Operation of the Ordinance must also be judged a taking under the criteria of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The operation of the Ordinance abridges Petitioners' rights to exclude others and to possess, use and dispose of their property. It severely affects the value of their residual interest in the land, frustrates their investment-backed expectations by effectively transferring to tenants the right to realize any appreciation the property may enjoy. Finally, unlike ordinary land use controls upheld by the courts, the Escondido Ordinance confers no reciprocal or general

advantages to property owners, or, for that matter, to successor tenants. It serves only to enrich those in residence when Escondido voters enacted the Ordinance.

Operation of the Ordinance must also be deemed a taking under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), because it does not substantially advance a legitimate state interest. It transfers valuable interests in property to incumbent tenants, but confers little or no benefit upon their successors (who are compelled to pay large premiums) and no benefits whatever on property owners.

For the same reasons, the Ordinance deprives Petitioners of property without due process of law because it lacks "a real and substantial relation to the objective sought to be attained." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980).

ARGUMENT

Emboldened by the political popularity of rent control, various state and local governments have gone further and transferred landlords' property interests to their tenants. The voters of Escondido, California did just that by enacting an initiative ordinance in June 1988. Because many more voters are renters than owners of rental properties, Petitioners have no prospect of obtaining just compensation for the property taken from them other than through this suit under the Constitution.

The Escondido Ordinance effects a government-authorized permanent physical occupation of Petitioners' property, transfers valuable property interests from Petitioners to their tenants and, while taking Petitioners' property without compensation, advances no legitimate interest of government. The court below erred in dismissing Petitioners' claims under the Fifth and Fourteenth Amendments to the Constitution for the taking of their property and the violation of their due process rights.

I. ESCONDIDO HAS TAKEN PETITIONERS' PROPERTY WITHOUT COMPENSATION.

The Escondido Ordinance, either standing alone or in combination with the California Mobilehome Residency Law, works a severe deprivation of Petitioners' property rights. The ordinance takes permanent possessory interests in real estate from property owners and gives them to tenants. This is a government-authorized permanent physical occupation of Petitioners' property and, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), must be compensated. The ordinance also has "an unduly harsh impact upon the owner's use of the property," so that, under the criteria of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a taking has occurred. Finally, the ordinance does not advance, substantially or otherwise, any legitimate governmental interest and so fails the test of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

A. Escondido Has Taken Petitioners' Property By Physical Occupation.

When government takes from a landowner the right of possession and confers that right upon another, the government has taken property by permanent physical occupation. The Escondido Ordinance does that by transferring from Petitioners and giving to their tenants the following: (1) the right to occupy the property in perpetuity; (2) the right to pay a rent below market rent in perpetuity; (3) the right to select the next tenant to occupy the property; (4) the right effectively to set and

collect the next tenant's rent by charging a premium on the sale of the mobilehome coach; and (5) the right to sell, bequeath, or let pass by intestacy all of these rights that were previously the park owner's property. Petitioners do not challenge rent controls as such. They do challenge the operation of Escondido's Ordinance, as applied to their properties, insofar as it appropriates interests in those properties.

The rights taken from Petitioners constitute a permanent possessory interest in their land. Because possession is at a rent well below market, this interest has a substantial monetary value. But for the Escondido Ordinance, Petitioners would have retained or could have sold such interests at the market price. Instead, incumbent tenants have been given this property and persons who want to become tenants bid tens of thousands of dollars more than the market value of the mobilehome coaches, precisely because ownership of each coach carries with it, by law, a permanent possessory interest in Petitioners' land.

The total loss to the landowners is very severe. In *Azul Pacifico Inc. v. Los Angeles,* ___ F.2d ___, Nos. 90-55853 & 90-56066, slip op. 15213 (9th Cir. Nov. 1, 1991), the court noted that "[o]ne Mrs. Morrison, for example, testified that she bought a coach in Azul Pacifico's park for $77,000 and immediately sold it for $5,000 and had it removed from the pad. When asked why, she responded: 'The use of the land was what I paid for more than the place.'" *Id.,* slip op. 15213, 15218. The $72,000 that Mrs. Morrison had paid for the use of the land was precisely the monetary value of the bundle of rights that the city had taken from the land owner and transferred to the tenant, who sold it to her. In other words, the former owner of a nearly worthless mobilehome coach had sold Mrs. Morrison the use of another citizen's land. That, as

the *Azul Pacifico* court held, was a taking of property within the meaning of the Fifth and Fourteenth Amendments. So it is here. A property interest compensable under the Takings Clause is "that value which is capable of transfer from owner to owner and thus of exchange for some equivalent." *Kimball Laundry Co. v. United States,* 338 U.S. 1, 5 (1949). Petitioners seek the opportunity to prove at trial that the interests taken by Escondido fit that description.

While there are various ways of characterizing takings, a right of permanent possession is, quite obviously, government-authorized permanent physical occupation of Petitioners' property. Thus, this situation is, as two federal Circuits have held, indistinguishable from *Loretto. See Hall v. Santa Barbara,* 833 F.2d 1270 (1987); *Pinewood Estates v. Barnegat Township Leveling Bd.,* 898 F.2d 347 (3d Cir. 1990); *Azul Pacifico,* slip op. 15213.

In *Loretto,* this Court answered in the affirmative "the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." 458 U.S. at 421. The case now before the Court presents precisely the same question, except that the permanent physical occupation of the owner's property is not minor but major.[4] Otherwise the cases are identical.

The New York law at issue in *Loretto* compelled landlords to allow cable television companies to install cable equipment on rental properties. Teleprompter installed cables, directional taps and two large silver boxes on

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[4]This case also differs from *Loretto* in that, as will be shown below, the Escondido Ordinance serves no legitimate public purpose.

Loretto's apartment building. The Court rejected attempts to defend the statute under the criteria in *Penn Central.* The City argued that: (1) the invasion of Loretto's property was very minor, consisting of a few small items of equipment in otherwise unused space; (2) there was no significant economic impact upon the owner; and (3) the statute was only an innocuous land use regulation or adjustment of landlord-tenant rights. This Court rejected all of these contentions, holding that the forced permanent occupation of even a small portion of Loretto's property by a third party was an unconstitutional taking of her property. The Court rejected the City's attempt to apply the *Penn Central* criteria to permanent physical occupations and recognized a *per se* rule that such occupations constitute compensable takings:

> In short, when the "character of the governmental action" is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Loretto, 458 U.S. at 434-35 (citation omitted).

The Court also rejected the City's argument that the statute could be defended as a legislative creation of a right to cable installation "as an appurtenance to the tenant's leasehold." *Id.* at 439. The Court held that "the government does not have unlimited power to redefine property rights." *Id.*

The City had argued that there was no taking because an invasion of private property by a private party was different from an invasion by government. The Court responded that "[a] permanent physical occupation authorized by state law is a taking without regard to

whether the State, or instead a party authorized by the State, is the occupant." 458 U.S. at 432 n.9 (citing *Kaiser Aetna v. United States,* 444 U.S. 164 (1979)). Here, as in *Loretto,* a party (or a series of parties, each taking by sale or descent from the previous tenant as authorized by law) has been governmentally authorized to occupy Petitioners' land permanently.

Nor does it matter that the Escondido Ordinance applies only to rental property. The Court rejected that distinction in *Loretto* as well: "We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation." *Id.* at 439. The argument rejected by the Court was an attempt to analogize New York's law to an ordinary rent control statute and thus to deny any taking. Petitioners are not attacking the constitutionality of rent control without compensation. They challenge the taking of an interest in real estate that goes far beyond controlling rents.

As in *Loretto,* the law permits the occupant of the plaintiff's property to sell rights obtained by operation of law. Suppose that this Court had held that the attachment of cable television facilities to the apartment building was not a taking. If Teleprompter chose to sell its cable television business, it would have been able to sell its attachments to apartment buildings. The New York law would thus have enabled Teleprompter to occupy a portion of Loretto's property and to sell the right to occupy her property and others' in perpetuity. That is exactly what has happened here and, as in *Loretto,* the property owners have suffered a taking for which they are constitutionally entitled to just compensation.

The landlord's twin obligations to accept as a tenant any purchaser of a mobilehome coach on his property and to charge only the controlled rent to the incoming tenant

mean that a departing tenant can sell not only his mobilehome coach but a right to permanent occupancy at a rent below the market level to a person of his choosing. The departing tenant sells, and the incoming tenant acquires, a present possessory interest akin to a permanent statutory leasehold. The right to occupy land permanently at below market rent is an estate in land of substantial monetary value. *See United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945). The Escondido Ordinance by itself, in the absence of state law, can create that right. The Escondido Ordinance in combination with the California mobilehome Park Residency Law inevitably accomplishes that end. The result is that the departing tenant charges a premium for that right in the price of his mobilehome to the incoming tenant. The premium, which amounted to more than $20,000 per space in *Azul Pacifico*, slip op. 15213, 15230-31, represents the capitalized value of a right to occupy land in perpetuity at less than market rentals. As the *Hall* court observed:

> [T]he landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City . . . .

833 F.2d at 1279. As this Court has since observed, "[t]his element of *required acquiescence* is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (emphasis supplied).

Three panels of two United States Courts of Appeals following this Court's precedent have held that ordinances like Escondido's take from the owner and transfer to the tenant a present possessory interest in the realty. This transfer, the courts held, was accomplished by authorizing a permanent physical occupation which was a taking within the meaning of the Constitution. The Ninth Circuit so held in *Hall*. 833 F.2d at 1276 (the ordinance "transferred a possessory interest in [the owners'] land" consisting of "the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent"). That holding was reaffirmed in *Azul Pacifico*, slip op. 15213, 15218, 15225, following a trial where claims essentially identical to these Petitioners' were proved. The Third Circuit so held in *Pinewood*. 898 F.2d at 353 ("[T]he physical invasion of their properties and the uncompensated creation of interests in them worked by the Barnegat Ordinance in connection with the state law is far more pronounced than that in *Loretto*.").

These courts' decisions were compelled not only by *Loretto*, but also by *Nollan*, 483 U.S. at 839; *Kaiser Aetna*, 444 U.S. at 179-80; and *United States v. Causby*, 328 U.S. 256 (1946).

In *Nollan*, the California Coastal Commission had required owners of oceanfront property to grant a public access easement across their private beach. This Court said: "We think a 'permanent physical occupation' has occurred for purposes of [the *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently on the premises." 483 U.S. at 832. In this case, particular individuals were given the right to station themselves permanently on the premises and, since that right is alienable, a stream of individuals may pass through Petitioners' property.

Kaiser Aetna dealt with a similar situation. Kaiser Aetna owned a pond which it developed as a marina and cut through a barrier beach to connect the pond with a

bay of the Pacific Ocean. The Army Corps of Engineers, which had previously informed the company that no permit was required, then asserted that the connection made the pond navigable water subject to a navigational servitude available to the general public. This Court refused to accept the government's contention that, as a result of making the improvements, the "owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property — the right to exclude others." 444 U.S. at 176. "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of Petitioners' private property; rather the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina." *Id.* at 180.

Similarly, *Causby,* 328 U.S. at 265, held that the government had taken an easement in property by a "direct invasion of respondents' domain" when military aircraft regularly flew so low over the land as substantially to lessen its value and interfere with its use as a chicken farm.

In *Hall,* the Ninth Circuit, relying on these precedents, "held that the challenged ordinance could be found to transfer a possessory interest in land to the mobilehome tenants, and thus constituted a physical occupation." *Azul Pacifico,* slip op. 15213, 15221. In *Pinewood,* the Third Circuit reached the same conclusion:

> [T]he physical invasion of their properties and the uncompensated creation of interests in them worked by the [ordinance] in connection with the state [residency] law is far more pronounced than that in *Loretto.* Here, there has been a permanent transfer of the appellants' possessory interests to each tenant to occupy a rent controlled pad. Thus, although the interest belongs to the appellants, the landlords, the effect of the law is to transfer the interest, without compensation, from the landlords to the tenants. Accordingly, a tenant may, by determining the purchaser of his mobile home, select the new tenant for the park and command a premium for the alienation of the right to occupy the pad at a controlled rent to the complete exclusion of the appellants. The combined impact of the statute and the ordinance operates to deprive the appellants of their possessory interest in the pad permanently.

898 F.2d at 353. Hence, as in *Loretto,* the Escondido Ordinance "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto,* 458 U.S. at 435. Petitioners submit that this Court's decisions require the conclusion that Escondido has taken Petitioners' property by permanent physical occupation.

B. Escondido Has Taken Petitioners' Property Under the Criteria of *Penn Central,* by an Oppressive Deprivation of Property Rights.

The Escondido Ordinance, alone and in concert with state law, cuts across the property owner's rights to possess, use and dispose of the property, and it is those rights that inhere in property, rather than land, buildings or other tangible things, that enjoy constitutional protection. *General Motors,* 323 U.S. at 377-78. *Penn Central* calls for an examination of the character and economic effect of government action, as well as interference with distinct, investment-backed expectations. On all counts, the effects are severe.

1. The Escondido Ordinance deprives Petitioners of protected property rights.

Quite aside from the question of physical occupation, Petitioners have suffered such a severe deprivation of their rights in real property that the conclusion of an uncompensated taking is unavoidable. Escondido has taken from Petitioners their rights to possession of their land, their rights to receive rents, their rights to enjoy any future appreciation of their lands' value, and their rights to leave their property to their heirs. The "character of the governmental action," *Penn Central*, 438 U.S. at 124, cuts across the property owner's right to use, possess and dispose of his property.

The right to possession includes the right to exclude others, which is a fundamental property right. Petitioners' right to exclude has been abridged by the forced occupation of the premises by an "interloper with a governmental license." *Florida Power*, 480 U.S. at 253. *Kaiser Aetna* held that though the company retained the ownership and use of its marina, the Government's imposition of a navigational servitude had infringed the " 'right to exclude,' . . . universally held to be a fundamental element of the property right [which fell] within the category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179-80. Similarly, *Nollan*, 483 U.S. at 832, held that California's imposition of an easement destroyed the property owners' " 'right to exclude [others,] "one of the most essential sticks in the bundle of rights that are commonly characterized as property," ' " (quoting *Loretto*, 458 U.S. at 433 (quoting *Kaiser Aetna*, 444 U.S. at 176)).

The right to use of the property as income property has been abridged. Ownership of real property has long included the right to enjoy its rents and profits. As Justice

Holmes noted in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the right to mine coal has value because it can be exercised with a profit. *Id.* at 414. Equally, what makes the right to own a mobilehome park valuable is the right to collect rent for the use of spaces, common areas and amenities. The "use" of Petitioners' property as income property is the ability to collect rents. The right to collect rents exists as an incident of ownership of real property and is personal property to the extent that it is an element of contract created by a lease. "Valid contracts are property," *Lynch v. United States*, 292 U.S. 571, 579 (1934), and under California law, "[t]here may be ownership . . . of all obligations." Cal. Civ. Code § 655 (West 1991). This Court has demonstrated its willingness to protect the right to keep the value of the use of the property. An asset's earnings are "incidents of ownership" just as the asset itself is property, and both enjoy constitutional protection. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Petitioners do not challenge all rent controls as such,[5] but in Escondido the right to collect rents has been effectively transferred from the owner of the property to departing tenants, who are empowered to sell to others the right to possess the property at reduced rents. *Accord, Hall*, 833 F.2d at 1278-79.

The right of disposition has been effectively transferred to the tenant in possession, who reaps a windfall by

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[5]Petitioners note that this Court has never considered the operation or application of rent controls, except as a temporary measure in time of war or its aftermath; nor has the Court considered laws that compel property owners to offer accommodation for rent at controlled rates. *See, e.g., Block v. Hirsh*, 256 U.S. 135 (1922); *Bowles v. Willingham*, 321 U.S. 503 (1944). The Court need not reach those issues to decide this case.

selling the property rights guaranteed by the ordinance in addition to his mobilehome coach. Residents in place can demand premiums, which incoming residents (like Mrs. Morrison in *Azul Pacifico*) are willing to pay, because they are selling and buying the use of the *owner's* land. In *Hall*, the Ninth Circuit distinguished precedents cited by the City of Santa Barbara (notably decisions upholding rent controls enacted under the war power) because in none of those decisions had there been any suggestion that the tenant's right to reduced rent was transferable, had a market value, or was in fact traded so that tenants could reap a windfall. *Hall*, 833 F.2d at 1278. The existence of such windfalls was proved in *Azul Pacifico*. There can be no clearer example of the infringement, even destruction, of constitutionally protected rights of possession, use and disposition, than sale of the use of another citizen's land.

2. The economic impact of the Escondido Ordinance is severe.

The economic impact is immense: creation of 1,237 estates in land in Petitioners' mobilehome parks, estates that may be worth tens of thousands of dollars each, if the facts to be proved here are like those proved in *Azul Pacifico*.

Petitioners receive controlled rents which decline in constant dollars because of inflation. The tenants' rental expense also declines in constant dollars, so the value of the leasehold interests created by the Escondido Ordinance will increase as the margin between market and controlled rent grows wider from year to year. If rent increases were allowed when vacancies occur, Petitioners

would be able from time to time to narrow this margin.[6] Under the existing ordinance (with its "vacancy control" provision), when tenants in residence at the time of the June 1988 election move away, they can collect in premiums the difference between market and controlled rents. Since tenants sell use of the owner's land along with their mobilehome coaches, they can capture any nominal appreciation in land values attributable to inflation, as well as any real appreciation attributable to location, market conditions and the like.

Petitioners can sell or bequeath only what remains to them, and their ownership is now subject to permanent, below-market leaseholds imposed by operation of law. Their residual interest, a leased fee, will be worth far less than the unencumbered fee interest they owned before June 1988. The crucial point is not simply the severe economic loss, but the reason for that loss: a redistribution of interests in the realty. The total value of all interests in the property (*i.e.*, the park owner's leased fee and the tenants' leaseholds) should remain the same (measured in constant dollars, all other things being equal). But as the owner's share of the bundle of rights shrinks by operation of law so does the value of the owner's residual interest.

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[6] Tenants, like the rest of us, are not immortal; nor are they immune to the normal familial and economic pressures that occasion vacancies even in rent controlled housing. If they are denied the right to cash out, tenants can enjoy the benefits of rent control only so long as they remain tenants, not beyond. When the premises become vacant, the landlord is able to reassert a measure of control over his property.

Hall, 833 F.2d at 1279 (footnote omitted).

3. The Ordinance interferes with reasonable investment-backed expectations.

For the same reasons, the interference with Petitioners' investment-backed expectations is severe: destruction of any prospect of capital gain, a usual goal for investments in real estate. Investors in income property hope to operate profitably, so that rents exceed expenses and debt service, then sell the property for more than the purchase price. For that reason, standard appraisal analysis estimates operating income over the term of ownership plus the later reversion when the property is sold.[7] Since the value of any income property is a function of future earnings, which decline in constant dollars, property values, adjusted for inflation, are certain to decline. This decline can be arrested and restored from time to time if property owners are permitted to bring rents to market when vacancies occur. Under the Escondido Ordinance, however, the decline is progressive and permanent.

Looked at another way, the Ordinance transfers valuable rights to residents in place in June 1988, including the right to occupy the space permanently for reduced rent. Residents may sell those rights to their successors for a price equal to "the capitalized value of both the use value (foregone rents) and the possessory interest (the right to exclude)." *Azul Pacifico,* slip op. 15213, 15232. The value of the property owner's remaining interest in his property

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[7] *See, e.g.*, Society of Industrial Realtors, INDUSTRIAL REAL ESTATE 121 (4th ed. 1984) (emphasis supplied) ("Essentially, the return on industrial real estate can be divided into two separate areas, annual income flow and capital appreciation. As a very practical matter, both *income flow and capital appreciation* are, and should be, considered in calculating return on investment. . . . [T]he two together *constitute the total return anticipated on the investment.*")

declines accordingly, as the city conceded in *Azul Pacifico. Id.*, slip op. 15213, 15231 n.9.

This decline in the value of the owner's property (or more precisely, his residual interest in the property) thus differs fundamentally from reductions in value occasioned by ordinary land use regulations *because the decline reflects a transfer of property rights to third party occupants.* Moreover, the Escondido Ordinance confers no benefits on mobilehome park owners or, for that matter, incoming residents obliged to pay large premiums for used mobilehome coaches.

Petitioners assert rights in their property, including the right to such fruits of their property as appreciation, if it occurs. Petitioners, like other investors, expected to operate their properties profitably, and ultimately, to sell them for more than the original price. At trial, Petitioners expect to prove that those expectations were the basis for their decisions to develop or purchase their properties. They had, in other words, distinct, investment-backed expectations — expectations thwarted by the Escondido Ordinance. The marketplace may or may not bear out their expectations, but the City cannot frustrate those expectations by appropriating interests in property without first paying just compensation.

4. The Escondido Ordinance affords no reciprocal advantages.

Agins v. Tiburon, 447 U.S. 255, 260-61 (1980), teaches that private and public interests must be weighed. Often, zoning and other land use regulations are upheld because they benefit all citizens, even those whose properties bear the principal burden. *See, e.g., Penn Central,* 438 U.S. at 133-35. The Escondido Ordinance benefits residents in place at the time of the June 1988 election. Future

residents pay large premiums for mobilehome coaches, so they obtain no benefit (except to the extent they may capture future appreciation of the land when they sell). The Ordinance confers no benefit whatsoever upon the owners of mobilehome parks.

Penn Central teaches that the presence of a taking by regulation is to be determined, in part, by the magnitude of the owners' loss. *Id.* at 124. Had Petitioners been permitted to proceed to trial, they would have undertaken to prove that they sustained substantial losses, comparable to those proved in *Azul Pacifico*.[8] But the magnitude of the loss to the property owners here is much greater than in *Penn Central* for the additional reason that the company there received compensating benefits. Petitioners here receive no benefit whatever from this Ordinance that has taken so many of their rights in property.

The New York law at issue in *Penn Central* permitted an owner whose property had been designated an historic landmark to transfer his development rights to other properties, thus mitigating the burden of the regulation. The Court reasoned, moreover, that all citizens, including the owners of Grand Central Station, benefited from the preservation of historic landmarks. The property remained in precisely the condition it was, and the Penn Central company could make some use of air space by transferring development rights to other parcels.

None of this is true of Petitioners' property. The City has simply taken part of the property. Petitioners receive absolutely nothing in return to mitigate their loss. In *Penn Central*, there was admittedly a permissible govern-

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[8]The City could, of course, very substantially reduce those damages by revising its ordinance to eliminate any constitutional taking for the future.

mental goal that was advanced by appropriate means. The Escondido Ordinance takes Petitioners' property in a way that advances no legitimate governmental purpose.

II. THE TRANSFER OF RIGHTS IN PETITIONERS' REAL PROPERTY DOES NOT SUBSTANTIALLY ADVANCE A LEGITIMATE GOVERNMENTAL INTEREST AND THUS CONSTITUTES A TAKING.

A statute takes property if it does not *substantially* advance legitimate state interests. *Nollan*, 483 U.S. at 834 n.3. *Nollan* held that California's imposition of an easement upon the Nollans' property had little connection with the justifications advanced for the exaction. Without an adequate nexus between ends and means, the Court reasoned, the purpose became "quite simply, the obtaining of an easement . . . but without payment of compensation." *Id.* at 837.

This Court also stressed in *Nollan* that the nexus requirement is more stringent than its counterpart under the Equal Protection Clause. *Id.* at 835 n.3. More is required than a plausible reason:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original). Measured by these standards, Escondido's ordinance cannot pass constitutional muster.

The Escondido Ordinance contains no recitals or findings, so its purposes are obscure. The June 1988 ballot described the measure as "mobilehome rent control . . . , providing as a base rent the rent in effect on January 1, 1986." (J.A. 7). The City's opposition to the petition to this Court asserted that:

> The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases therefore protecting the homeowner's [*sic*] investments, while also providing park owners with a just and reasonable return on the park owner's [*sic*] investment.

Respondent's Brief in Opposition at 27.[9] The Escondido Ordinance does not, and cannot, achieve any of these purposes.

Controlling rents is the supposed purpose. *But no one actually pays the controlled rent.* The tenant in residence when the Ordinance was enacted pays far less. Later residents pay far more. The tenant in place in June 1988 pays controlled rent until he leaves. At that point, he receives the monetary value of future rent savings in the form of a resale premium, even though he will not be there. The premium offsets his rent payments during occupancy, so overall, he pays far less than the controlled rent. In fact, depending on how soon he leaves, this tenant may actually recover in the premium an amount larger

[9]Had Petitioners been permitted to go to trial, they would have offered evidence that handbills were distributed at the Petitioners' mobilehome parks urging residents to vote for the initiative with these words: "You Can Dramatically Increase The Value of Your Homes."

than the sum of his rent payments. He will have made a profit by living in the mobilehome park.

By contrast, the incoming tenant does not pay the controlled rent and receives no benefit from it since he must pay a large premium, equal to the capitalized value of the difference between controlled rent and market rent. *Azul Pacifico,* slip op. 15213, 15225. He pays the equivalent of market rent, but pays the difference between market rent and controlled rent in advance to the former tenant rather than to the owner of the property. No legitimate purpose is served by such an irrational scheme. This defeats the purpose of the Escondido Ordinance, however it may be characterized. The only goal accomplished is a one-time wealth transfer from property owners to tenants in residence at the time of the election in June 1988.

The Escondido Ordinance can do nothing to alleviate alleged scarcity of spaces in mobilehome parks. By rolling rents back to the level of January 1986, then holding them below market, even when mobilehome coaches are sold in place, the Ordinance tends to deter new construction.[10] Keeping rents frozen when homes are sold in place does nothing to alleviate the effects of scarcity. The fortunate citizens in residence when the initiative passed may col-

[10]The Hirsch study attributes the dearth of new mobilehome parks in California to "the severity of mobilehome rent controls." Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 463 (1988).

In apparent recognition of the deterrent effect of local rent control upon new construction, state law now exempts from local rent controls any "newly constructed [mobilehome coach] spaces initially held out for rent after January 1, 1990." Cal. Civ. Code §§ 798.7, 798.45 (West 1991).

lect windfalls when they move away and sell the bargain leasehold created by the Ordinance, as well as their mobilehome coaches. Other residents will pay (or, at still greater cost, finance) resale premiums that effectively wipe out any saving.

Nollan calls for a close fit between means and ends. 483 U.S. at 838. Protecting investments in depreciable personal property by granting estates in underlying land "does not even meet the most untailored standards." *Id.*[11]

In *Azul Pacifico*, the Ninth Circuit suggested, based on trial testimony, that restrictions like those at issue here might protect residents from exorbitant rent demands that could depress mobilehome prices to distress levels. *Id.*, slip op. 15213, 15228. Indiscriminate appropriation of leasehold interests from all mobilehome park owners has little connection with the supposed purpose of preventing abusive conduct and fails to satisfy the close fit requirement of *Nollan*.

The means have little to do with the end, which could easily be served by other means that do not appropriate citizens' property. "We . . . need to know . . . the availability and effectiveness of other less drastic protective steps . . . ." *Goldblatt*, 369 U.S. 590, 598 (1962).[12] If prevention of predatory business practices were the objec-

[11]Mobilehome coaches are personal property. *Hall*, 833 F.2d at 1273. Standard references such as the Kelley Blue Book confirm that mobilehome coaches depreciate, like most personal property. *Id.* at 1274 n.5.

[12]The insistence upon a nexus between the end sought here and the means used is a variant of the harms test. Not having caused the harm, the bulk of the park owners now are asked to underwrite alleged losses which are not consequences of their conduct. *See Goldblatt*, 369 U.S. 590, and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

tive, Escondido could adopt a variety of measures tailored to that objective, such as regulations limiting rent increases at resale to market rates, determined without reference to local rent controls.[13]

Moreover, the risk of exorbitant rent demands when mobilehomes are offered for sale is illusory.[14] Rational owners who wish to raise rents when mobilehome coaches are sold would be foolish to demand rents that deter listings and sales and so foreclose any opportunity to raise rents. Common sense and the owners' own interests will lead to market rents, which incoming residents already pay under the Ordinance, albeit in the guise of a resale premium. The risk of isolated, aberrational or even irrational abuses does not justify wholesale appropriation of leasehold interests in *all* mobilehome spaces.

[13]In response to *Hall*, many California cities have enacted such regulations. For example, the City of San Jose has enacted an ordinance in explicit response to the *Hall* decision suspending vacancy control until the City Attorney certifies that such provisions do not constitute a compensable taking. San Jose, Cal., Ordinance No. 23914.

[14]The only serious analysis of the actual operation of ordinances like Escondido's was published by Hirsch & Hirsch, *supra* note 7. They examined 344 mobilehome coach sales in 40 California cities. Forty percent of those sales came from cities subject to rent controls. Generally, resale prices for mobilehome coaches exceeded the sales price of comparable coaches sold by dealers, plus transportation and installation costs. In other words, they found what is known in the industry as "placement value." Where rents remained controlled, and mobilehome coaches were sold in place, prices were still higher. If "gouging" or other predatory conduct were widespread, and distress sales common, resale prices would be below "blue book" prices offered by dealers; but such "negative placement value" is rare. *Id.* at 426-28, 440, 445.

To pass constitutional muster under *Nollan* and *Agins* the Escondido Ordinance must *substantially* advance legitimate state interests. The prohibition upon rent adjustments when mobilehomes are sold in place serves no such purpose, enriches one group at the expense of a few, and violates the Takings Clause of the Fifth Amendment.

III. THE ORDINANCE DEPRIVES PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BECAUSE THE MEANS CHOSEN ARE NOT REASONABLY NECESSARY TO ACHIEVE THE STATED GOALS AND THE ORDINANCE WORKS AN UNDULY OPPRESSIVE RESULT UPON PETITIONERS.

Petitioners' complaints state claims for deprivation of property without due process of law and, if the allegations are established at trial, the Escondido Ordinance must be stricken as constitutionally infirm with or without compensation.

The Court has long held that even where the existence of a public purpose is established, the means chosen to achieve that purpose must be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Lawton v. Steele*, 152 U.S. 133, 137 (1894). The test of *Lawton* has been described as the "classic statement of the rule" and remains valid today. *Goldblatt*, 369 U.S. at 594. The Due Process Clause protects against arbitrary and capricious governmental action. While the Court is not cast in the role of a superlegislature, there remains a need for limited review of both the purpose and the means chosen. "[O]ur cases have not departed from the requirement that the government's chosen *means must rationally further* some legitimate state purpose." *Moore v. East Cleveland*, 431 U.S.

494, 498 n.6 (1977) (emphasis added). The vitality of the substantive due process clause exists in an economic context. *See Lynch v. Household Fin. Co.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one"); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

While it is correct that the courts grant great deference to legislative decisions regarding economic matters in general and rent control in particular, *see, e.g., Pennell v. San Jose*, 485 U.S. 1 (1988), if the action is arbitrary the Due Process Clause will be invoked to invalidate the provisions of an ordinance that are not rational and related to a legitimate governmental purpose. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Moore*, 431 U.S. 494.

The specific provision at issue in this case is the vacancy control provision. The courts are obligated under the Due Process Clause to determine whether that provision has "a real and substantial relation to the objective sought to be attained." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980) (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)).

The Court has not settled on a particular form of words to express the "rational means" leg of the test. It has spoken at various times of "a real and substantial relation to the object sought to be obtained";[15] "means . . . reasonably necessary for the accomplishment of the purpose";[16] "a reasonable relation to some purpose";[17] "a reasonable

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[15] *PruneYard*, 447 U.S. at 85 (quoting *Nebbia*, 291 U.S. at 525).

[16] *Goldblatt*, 369 U.S. at 595 (quoting *Lawton*, 152 U.S. at 137).

[17] *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

relation to the State's legitimate purpose";[18] "no relation to the legitimate end";[19] "no relation to the elimination of those evils";[20] "a manifest tendency to cure or at least to make the evil less";[21] "demonstrably irrelevant to the policy the legislature is free to adopt";[22] "means . . . rationally further[ing] some legitimate state purpose";[23] or "a rational means to achieve [the] purpose."[24] Under any of these formulations, the basic requirement is the same: there must be some reasonable nexus between the stated goal and the means supposedly invoked to serve that goal. Merely stating a worthy purpose will not validate a measure that plainly has no tendency to accomplish the purpose. In applying this test, "the reasonableness of each regulation depends upon the relevant facts." *Nebbia,* 291 U.S. at 525.

As discussed in connection with *Nollan,* on the allegations of the complaints, Escondido's prohibition of rent increases when mobilehome coaches are sold fails to meet this test. The ostensible purposes include the alleviation of scarcity and its effects, and the preservation of affordable housing. In reality, the Ordinance completely fails to

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[18]*Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 125 (1978).

[19]*Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 424 (1952) (noting issue not presented).

[20]*Daniel v. Family Security Life Ins. Co.,* 336 U.S. 220, 224 (1949).

[21]*North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 167 (1973) (quoting *Liggett Co. v. Baldridge,* 278 U.S. 105, 115 (1929) (Holmes, J., dissenting)).

[22]*In re Permian Basin Area Rate Cases,* 390 U.S. 747, 770 (1968) (quoting *Nebbia,* 291 U.S. at 517).

[23]*Moore,* 431 U.S. at 498 n.6 (plurality opinion).

[24]*Id.* (White, J.).

serve these purposes. Rather, as the courts found to be true in *Azul Pacifico,* the Ordinance instead shifts the incoming resident's housing cost from rent to initial purchase price (and probably mortgage payments). Thus, it does nothing to ameliorate housing costs for incoming tenants. It does operate to transfer interests in property, and with them, a large portion of the property's value, from the park owner to the incumbent tenant — a purpose not reasonably defensible as (and not claimed to be) a legitimate governmental goal.

> [T]his Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.

Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55, 80 (1937); *accord, e.g., Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 245 (1984) ("[T]he Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party . . . [or] a particular class of private individuals").

Nor is the ordinance saved by the suggestion that a secondary goal is to prevent unscrupulous landlords from threatening to increase rents so much upon sale that incumbents are unable to find buyers. *See Azul Pacifico,* slip op. 15213, 15228. This asserted purpose assumes that park owners will act irrationally and directly contrary to their obvious self-interest. The hypothesis seems to be that if rent increases upon resale are not controlled, a park owner will demand such high rents from incoming tenants that the incumbents will be unable to sell. If rents were allowed to rise when mobilehome coaches were sold, an owner whose demands prevented sales would deprive himself of his only opportunity for an increase. This is so

unlikely as to be fanciful. The Court is not obligated to accept at face value a theory that does not make economic sense. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Even assuming that there might be a foolish park owner somewhere who might act in this self-defeating fashion — a point on which no evidence has been adduced, due to the premature dismissal of this case on the pleadings — this ordinance would hardly be a "means . . . reasonably necessary for the accomplishment of the purpose." *Goldblatt*, 369 U.S. at 595 (quoting *Lawton*, 152 U.S. at 137).

These facts, as alleged in the complaint, serve to explain why this case is different from the many modern cases that have rejected challenges based on arbitrariness or irrationality. In nearly all of them, the focus of the attack was on the legitimacy of the purpose sought to be served. But once that purpose was held to be a valid one, there was little or no room for a serious contention that the challenged provision did not serve the goal. Thus, for example, in *Midkiff*, the approved public purpose was to break up oligopolistic land holdings and encourage more widespread fee ownership of land. This purpose was plainly served by condemning portions of the large holdings for transfer to residents, especially since the statute forbade transfers of multiple parcels to particular individuals and required hearings as to whether particular condemnations would further the purposes of the act. 467 U.S. at 233-34, 242. In *PruneYard*, the purpose was to promote wider opportunities for free public expression; that goal was undeniably served by requiring shopping centers to permit peaceable petitioning. 447 U.S. 74. In *Goldblatt*, the problem was the dangerous and noxious operation of underwater mining within town limits, and the solution was to ban such operations. 369 U.S. 590. In *Nebbia*, the evil was price instability in the milk market,

and the cure was price control. 291 U.S. 502. In *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), the evil was insufficient professional control and oversight over the conduct of pharmacy businesses; the cure was to require that owners or majority stockholders of pharmacies be licensed pharmacists. In *Berman v. Parker*, 348 U.S. 26 (1954), the problem was pervasive slum conditions, and the solution was condemnation to allow a balanced, coordinated redevelopment effort. In *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), the goal was to encourage voter turnout, and the means was to forbid employers to penalize employees for time taken off to vote. In all of those cases, unlike this one, the direct, logical connection between the asserted goal and the means employed was quite clear.

The lower court in this case dismissed Petitioners' complaints on demurrer, without giving Petitioners any opportunity to try to prove their case. The City's argument in support of this act amounts to an assertion that the courts are obligated to accept any proffered justification of a statute at face value, no matter how tenuous its logic or dubious its assumptions. If that were the law, there would be no point in pretending to have a constitutional protection against irrational and arbitrary laws, for there is probably no possible enactment that cannot be *somehow* argued to support some legitimate purpose, if the logic of that argument is deemed to be entirely immune from any judicial scrutiny. Although parties challenging a law as irrational bear a heavy burden of proof, they cannot properly be denied their opportunity to carry that burden. They are entitled to introduce evidence in support of the contention. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938)) (both equal protection cases); *cf. Goldblatt*, 369 U.S. at 595-96

(rejecting an irrationality challenge because the challenging party failed to introduce evidence to carry his burden). While it is true that the Court will not second-guess reasonable legislative choices based on conflicting empirical evidence, Petitioners should have their day in court to try to prove that the Ordinance does not reasonably serve any of its purported purposes.

CONCLUSION

For these reasons, the judgment of the California Court of Appeal should be reversed with instructions to remand these consolidated cases for trial.

Dated: November 27, 1991

Respectfully submitted,

ROBERT J. JAGIELLO
DEBRA K. BUTLER
Jagiello & Pech

ROBERT H. BORK